BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAULLET DIXON	)	
Claimant	)	
	)	
VS.	)	
	)	
KOCH INDUSTRIES	)	
Self-Insured Respondent	)	Docket No. 1,001,771
	)	

ORDER

Respondent requested review of the January 8, 2004 Award by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on June 29, 2004.

APPEARANCES

Dennis L. Phelps, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found the claimant sustained a 3 percent functional impairment as a result of her compensable accident. He further found the respondent did not have just cause to terminate claimant from her job with respondent. Thus, claimant was entitled to a work disability as she had yet to return to a comparable wage. The ALJ went on to conclude claimant had made a good faith effort to find suitable employment following her termination. Therefore, no wage would be imputed to her and her actual wage loss of 100

percent, when averaged with the 40 percent task loss, yields a 70 percent work disability awarded by the ALJ.

The respondent requests review of this decision and alleges the ALJ erred in awarding functional impairment to the body as a whole along with work disability benefits. Respondent contends claimant is entitled to, at best, a 5 percent impairment of the right upper extremity at the level of the elbow for her mild epicondylitis. The balance of her left upper extremity complaints are not, according to respondent, causally related to claimant's work activities and are therefore non-compensable.

Claimant maintains the ALJ's Award should be affirmed in all respects. She argues that her bilateral upper extremity complaints were caused by her repetitive work as a NC Operator for respondent. Claimant maintains that her ongoing physical complaints are well documented within Dr. Lucas' records and that respondent has failed to provide any other cause for her problems. Claimant argues that her testimony, coupled with that offered by Dr. Lucas, are sufficient to establish her contention that it is more probably true than not that work caused her upper extremity problems, and that accordingly, she is entitled to work disability as well as the 3 percent functional impairment. Moreover, claimant asserts that respondent's decision to fire her on March 9, 2003 does not preclude an award for work disability under these facts and circumstances. Thus, claimant asserts that the ALJ's Award of 70 percent work disability should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ thoroughly summarized the facts of this case and they need not be repeated herein, except to explain the Board's findings.

Claimant was employed by respondent to operate a machine which required her to repetitively push, pull, reach and grasp parts and then install them on her machine. Claimant began to notice pain in her hands and wrists in December 2001. She was provided with treatment and placed on lighter duty on a cap table. This position increased her physical complaints. Claimant was then referred to Dr. George Lucas, a board certified orthopaedic surgeon, in February 2002.

Based upon claimant's complaints of pain and swelling in both wrists along with numbness and tingling, Dr. Lucas originally diagnosed mild bilateral carpal tunnel with some left side median nerve involvement, but he had some concern that her complaints

were out of proportion to his findings.[1] He continued to treat her conservatively but eventually abandoned his original diagnosis. Dr. Lucas testified that by February 2003 claimant's main complaint was right elbow pain. Claimant's test results continued to be normal yet her complaints of pain continued. At one point Dr. Lucas concluded claimant was suffering from "pain dysfunction syndrome" which is a term he has coined for those patients who have ongoing pain complaints without any objective correlating cause.[2]

Dr. Lucas eventually diagnosed ulnar nerve problems on the left side and mild lateral epicondylitis on the right and assigned a 3 percent impairment to the body as a whole for both of these conditions. When asked if these conditions were caused by work, Dr. Lucas first indicated in the affirmative.[3] Curiously, Dr. Lucas then testified that the ulnar nerve findings on the left were not caused by work, and that he only rated that condition based upon claimant's subjective complaints of pain and tingling in her ring and little fingers on her left hand.[4] In response, Dr. Lucas was then asked if the type of work activity claimant was performing "was at least an aggravating factor in her symptoms, correct?"[5] He responded by saying "Yes".[6]

When presented with no evidence contrary to the testimony of the claimant and Dr. Lucas, the ALJ concluded claimant had indeed been injured in an accident that arose out of and in the course of her employment. He concluded that the accident occurred on January 17, 2002, the date restrictions were first placed upon the claimant. The ALJ went on to rely upon the causation and permanency impairment opinions offered by Dr. Lucas, the only physician to testify, and awarded a 3 percent impairment to the body as a whole.

An injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[7] [W]hether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

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[1] Lucas Depo. at 6, 8.

[2] *Id.* at 10, 21.

[3] *Id.* at 14.

[4] *Id.* at 25-26, 36.

[5] *Id.* at 33.

[6] *Id.*

[7] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[8] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

In *Kindel*, the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501, *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

Under these facts and circumstances, the Board finds no reason to set aside or alter the ALJ's conclusions or findings on the issue of compensability and resulting functional impairment. It is uncontroverted that claimant's work was repetitive in nature and required her to consistently use her upper extremities. The record contains no other evidence that might explain claimant's condition or Dr. Lucas's ultimate diagnosis. The only physician to speak to the issue of permanency was Dr. Lucas, and although he certainly was somewhat equivocal in his testimony, the Board finds that his opinions are uncontroverted and that his testimony was, albeit by the barest of margins, supportive of claimant's position in this matter. For this reason, the ALJ's assignment of 3 percent functional impairment is affirmed.

The ALJ's Award went on to conclude that respondent did not have just cause to terminate claimant on March 9, 2003, and that she had made a good faith effort to find appropriate employment after her termination. He went on to find claimant was entitled to a 70 percent permanent partial general bodily disability based upon work disability principles set forth in K.S.A. 44-510e(a). This figure represents an average of a 40 percent task loss with claimant's actual wage loss of 100 percent.[10]

The pertinent statute provides, in part, as follows:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent**

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[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] The 40 percent task loss reflects an average of the two task loss opinions given by Dr. Lucas based upon the two separate task analyses offered by the parties.

> **of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk*[11] and *Copeland*.[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

In this instance, claimant was provided with accommodated duty until March 9, 2003, when she was terminated for what the respondent says was a terminable offense. According to respondent, claimant was fired from her job operating a press brake for damaging some equipment. It is uncontroverted that on March 1, 2003 claimant failed to set a stop on a rectangular valve die on the machine to which she was assigned. The cost of the resulting damage was $1,720 according to claimant's supervisor, David Pillow,

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] *Id.* at 320.

although the actual monetary damage was not revealed until many months after claimant was dismissed from respondent's employ. Claimant testified that she knew of no other employees who had been fired when parts had been damaged.

The ALJ concluded claimant's conduct did not constitute a bad faith effort to retain her accommodated employment, thus necessitating an imputed wage.[14] Respondent argues that under Kansas law employees may be fired for a cause unrelated to their work-related injury, even if they have a pending workers compensation claim.[15] Respondent's statement is accurate but is inapplicable to the instant case.

Under these facts and circumstances, the Board reject's respondent's argument and concurs with the ALJ's conclusions. Claimant's arguable negligence in operating the brake is simply that, negligence. The evidence makes it clear that her conduct does not rise to the level of willfulness or a lack of good faith. Moreover, it does not appear that the respondent consistently enforced its rule of terminating those employees who damage equipment. Claimant's termination does not prevent her from receiving an award for work disability. Because of this and her subsequent good faith efforts to find appropriate employment, claimant's actual wage loss should be used when calculating her work disability.[16]

Having concluded the ALJ appropriately used claimant's actual wage loss of 100 percent, the Board also finds the 40 percent task loss is appropriate and reasonable. It follows then that the 70 percent work disability assessed by the ALJ is affirmed.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 8, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

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[14] *Allison v. Southern Cal Transpor*t, No. 268,401, 2004 WL 1301706 (Kan. WCAB May 4, 2004).

[15] Respondent's Brief at 18 (filed Oct. 27, 2003).

[16] See *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800 (2003).

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BOARD MEMBER

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DISSENT

The following Board Member would reverse the ALJ's Award and grant claimant benefits based upon a right upper extremity impairment only. The testimony of Dr. Lucas is not sufficient to persuade the undersigned that claimant sustained a permanent impairment to her left upper extremity as a result of her work activities. When taken as a whole, Dr. Lucas' testimony is, at best, equivocal and his credibility was not restored or rehabilitated by counsel. That, coupled with claimant's extensive physical complaints that have no corresponding objective manifestation, compels this Member to deviate from the ALJ's conclusion and find that claimant failed to sustain her burden of proving anything more than a right upper extremity impairment. For that reason, I would reverse and modify the Award.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Douglas C. Hobbs, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director